FW INDUSTRIES BHD

v.

SUITECH SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[COMPANIES WINDING UP NO: D1-28-791-2007]
4 MARCH 2008

COMPANY LAW: *Winding up - Petition - Applications by way of summons-in-chambers filed shortly before hearing date of petition - Whether short service - Whether applications should be dismissed - Companies Winding Up Rules 1972, r. 7(2) - Companies Act 1965, ss. 222, 226, 218(1)(f)(i)*

COMPANY LAW: *Winding up - Petition - Stay of proceedings - Forum - Whether stay application should be made in court where first petition was filed - Interpretation of word "the Court" in s. 222 Companies Act 1965*

The petitioner filed a s. 218(1)(f)(i) winding up petition under the Companies Act 1965 ('the Act') against the respondent. The respondent did not raise any defence. However, applications were made by certain parties, namely, that of a creditor by way of summons-in-chambers in encls. 19 and 21 filed on 15 January 2008 and fixed for hearing on the same date as the present petition, *ie*, 24 January 2008. It was argued on behalf of the creditor whether the said enclosures could be heard first before the present petition was heard. Enclosure 21 sought to stay the hearing of the present petition pursuant to s. 222 of the Act whilst encl. 19 sought leave pursuant to s. 226(3) of the Act to proceed with a winding-up petition against the respondent in another court, namely, the Kuala Lumpur High Court Commercial Division No. 3 Court ('the No. 3 Court'). The creditor argued that the petition in the No. 3 Court was filed on 7 August 2007 whereas the petition in the present case was filed on 2 November 2007. Since the petition in the No. 3 Court was filed first, hence that petition should be heard first instead of the present petition. The petitioner objected to the said applications on the grounds of short service citing r. 7(2) of the Companies Winding Up Rules 1972.

Held (granting the petition):

(1) Enclosures 19 and 21 were not filed well in advance so as to enable the petitioner to file affidavits in reply to oppose the two applications and so that the two applications could be heard and disposed off well before the hearing of the petition. The reasons given for the late filing were lame excuses. (paras 9 & 10)

(2) The application for a stay of the present proceeding pursuant to s. 222 of the Act, in light of the winding-up petition in the No. 3 Court should have been made in that court instead of in this court. The words "the Court" in s. 222 refers to the winding-up court and in the context of the present case it means the No. 3 Court where the first petition was filed (or presented) since it was in relation to that winding-up proceeding that encl. 21 was filed. Only that court can restrain this court from proceeding with the present petition. (paras 10 & 11)

(3) The application by the intended intervener for an adjournment should be disallowed because it was filed very late. It was only filed on 22 January 2008 and the sealed copy of the summons in chambers was yet to be extracted and served on the petitioner and the respondent. (para 12)

Legislation referred to:
Companies Act 1965, ss. 218(1)(f)(i), 222, 226(3)
Companies (Winding up) Rules 1972, r. 7(2)

For the petitioner - Alex Chang; M/s Alex Chang & Co
For the respondent - absent
For the creditor, Logamwel Sdn Bhd - Gabriel Daniel; M/s Paul Ong & Assoc
For the proposed intervener - Albert Ewe; M/s Wan Ewe Chong
For the official receiver - Siti Mafuza

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Mohd Yunus J:

[1] This is a s. 218(1)(f) and (i) winding up petition by the petitioner against the respondent company.

[2] I granted the petition with costs. A

[3] I shall now state my grounds.

[4] I granted the petition because the cause papers were in order and that there was no defence at all raised by the respondent against the petition. In fact, the respondent was absent and there was no affidavit in opposition filed. B

[5] At the commencement of the proceeding there were applications for an adjournment by certain parties but I rejected the applications as they failed to satisfy me that there were good reasons for an adjournment. C

[6] First, there was the application by learned counsel, Encik Gabriel Danial, who, on behalf of a creditor, Logamweld Sdn Bhd, had applied for an adjournment of the hearing of the present petition so that their two summons in chambers applications, namely, encls. 19 and 21, which were filed on 15 January 2008 and also fixed for hearing on 24 January 2008 (that is on the same day as the present petition), could be heard first, before the present petition is heard. The purpose of encl. 21 is, *inter alia,* to stay the hearing of the present petition pursuant to s. 222 of the Companies Act 1965. The purpose of encl. 19 is, *inter alia*, to seek leave of this court pursuant to s. 226(3) of the Companies Act 1965 for Logamweld to proceed with a winding up petition against the respondent (Suitech) in another court, that is, the Kuala Lumpur High Court, Commercial Division No. 3 court. The argument of Logamweld is that the petition in the Commercial Division No. 3 court was filed on 7 August 2007, whereas the petition in the present case was filed on 2 November 2007. Counsel argues that since the petition in the Commercial Division No. 3 court was filed first, hence, that petition must be heard first instead of the present petition. D E F G

[7] Both applications, namely, encls. 19 and 21 were filed by Logamweld on 15 January 2008. H

[8] The learned counsel for the petitioner, Encik Alex Chang, objected to the application for an adjournment; and pointed out that there was short service on the petitioner in respect of encls. 19 and 21 as these two summonses in chambers were only served on his firm on Monday 21 January at 4.10pm. Encik Alex Chang cites r. 7(2) of the Companies (Winding-Up) Rules 1972. Encik I

Gabriel conceded that there was short service of the two applications but submitted that if the court were minded to proceed with the petition, instead of granting an adjournment to hear the two applications first, then he urged the court to waive the short service and to have the two applications heard together with the petition.

[9] I rejected the argument. I am of the view that if Logamweld is really serious in their applications, then they should have filed their applications, namely, encls. 19 and 21 well in advance (instead of filing them only on 15 January 2008) so that the petitioner would have the opportunity to file affidavits in reply to oppose the two applications; and so that the two applications could be heard and disposed off well before the hearing of the petition. In this regard, when I asked Encik Gabriel as to why encls. 19 and 21 were filed so late, the only answer that he gave was:

> Judge:
>
> Why were encls. 19 and 21 only filed on 15 January 2008?
>
> Encik Gabriel:
>
> It was filed late because we had to take instructions from clients. We had to secure the deponents to sign the applications

[10] With respect, the above excuse is very lame. It is unacceptable to me. Further, in my view, the application for a stay of the present proceeding pursuant to s. 222 of the Companies Act 1965, in the light of the winding-up petition in the Commercial Division No. 3 court, should have been made in that court instead of in this court. Section 222 reads:

> 222. Power to stay or restrain proceedings against company.
>
> At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

[11] The words 'the court' in the above section, to my mind, refer to the Winding-Up Court and in the context of the present case it means the Commercial Division No: 3 court, where the first petition was filed (or presented); since it is in relation to that Winding-Up proceeding that encl. 21 was filed. Only that court can restrain this court from proceeding with the present petition.

[12] The other party applying for an adjournment was Encik Albert Ewe, the learned counsel for an intended intervener, one Cheok Kim Kee. Cheok Kim Kee wants to intervene because, if allowed to intervene, he intends to apply to this court for a declaration that the court order dated 26 November 2007 (the court order that appointed the provisional liquidator) does not direct him to do anything (Cheok Kim Kee had received a letter from the provisional liquidator asking him to deliver all records of the respondent company in his possession to the provisional liquidator within three days). I disallowed the intended intervener's application for an adjournment because his application to intervene was only filed very late: it was filed only on 22 January 2008 and the sealed copy of the summons in chambers was yet to be extracted and served on the petitioner and the respondent.